

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION No.6555 of 2001****For Approval and Signature:****HONOURABLE MR. JUSTICE AKIL KURESHI
HONOURABLE MS. JUSTICE HARSHA DEVANI**

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the civil judge?

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BIPINKUMAR P. KHANDHERIA ADVOCATE - Petitioner(s)**Versus****DY. COMMISSIONER OF INCOME-TAX - Respondent(s)**

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Appearance:

MR JP SHAH for Petitioner(s): 1,
MR MANISH J SHAH for Petitioner(s): 1,
MRS MAUNA M BHATT for Respondent(s): 1,

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CORAM : HONOURABLE MR. JUSTICE AKIL KURESHI**and****HONOURABLE MS. JUSTICE HARSHA DEVANI****Date : 14/08/2012****ORAL JUDGMENT
(Per : HONOURABLE MS. JUSTICE HARSHA DEVANI)**

1. By this petition under Article 226 of the Constitution of India, the petitioner has challenged the notice dated 25th May, 2001 issued by the respondent seeking to reopen the petitioner's assessment for assessment year 1995-96 under section 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The petitioner, a practicing advocate, filed his return of income for assessment year 1995-96 on 26th March, 1997 with the Income Tax Officer, Ward 1(2), Rajkot. The assessment was taken up for scrutiny and by an order dated 20th November, 1997/27th November, 1997 made under section 143(3) of the Act, the total income of the petitioner was assessed at Rs.55,500/-. Subsequently, by the impugned notice dated 25th May, 2001, the assessment is sought to be reopened. The petitioner upon receipt of the above notice requested the respondent to furnish a copy of the reasons recorded. After some correspondence, such reasons came to be furnished which read as under:-

REASONS FOR RE-OPENING

Reg: Shri Bipinkumar P. Khandheria A.Y. 1995-96

In this case search action u/s.132 was conducted on 21.4.1995 at residence cum office premises of the assessee at Gondal. During the search in the statement recorded on oath u/s.132(4) of the I.T. Act, 1961 on 21.4.1995, in reply to question No.23 assessee made disclosure of unaccounted income of A.Y. 1995-96 and declaration in the prescribed form disclosing concealed income of Rs.25,15,753/- duly signed by the assessee is also filed. As per the same, assessee has made in his individual capacity a disclosure of following:

Rs.2000000/- Consideration received on account of sale of

factory.

Rs. 200000/-	Marriage expenses of his daughter.
Rs. 54000/-	On account of construction of shop known as Panchshil.
Rs. 20000/-	Difference of cash found during search.
Rs. 30000/-	Gold ornaments (four bangles) made during marriage.
Rs. 143000/-	Payment made to Babulal M. Bhalodia
Rs. 68753/-	Excise penalty paid on behalf of Jay Shakti Chemicals.

Rs.2515753/-

In reply to question No.24 of the statement on oath recorded on 21.4.1995, it is stated by the assessee that the tax payable on the disclosed income will be paid at the time of return of income becomes due for A.Y. 1995-96. So as per above, the assessee has not only disclosed the income of Rs.25,15,753/- but also agreed to pay the tax payable on disclosure.

For A.Y. 1994-95 assessment was completed in this circle on 27.3.1997 i.e. after the search operation. The assessee was well aware that his jurisdiction lies with this circle. Even then the assessee chose to file the return of income for A.Y. 1995-96 on 26.3.1997 with the ITO, Wd.1(2), Rajkot and got his assessment completed for A.Y. 1995-96 without making any reference to the search u/s.132 which was taken in his case on 21.4.1995 which shows mala-fide intention of the assessee. Both the return of income filed by the assessee for A.Y. 1995-96 and order passed u/s.143(3) of the I.T. Act, 1961 are out of jurisdiction and have no legal sanctity. On verification of return of income filed by the assessee for A.Y. 1995-96, it is seen that the assessee has not shown the disclosed income as per statement recorded on oath on 21.4.1995. The assessment order for A.Y. 1995-96 is passed u/s.143(3) of the I.T. Act, 1961 on 27.11.1997 at Rs.55,000/- which does not include the income disclosed by the assessee during the course of search and as discussed above the order is out of jurisdiction and seized material is not considered for finalisation of assessment.

Therefore, I have reason to believe that income chargeable to income-tax of Rs.25,15,753/- has escaped assessment. Hence the case is to be re-opened u/s.147 of

the I.T. Act, 1961.

3. The petitioner by a letter dated 25th June, 2001 requested the respondent for a copy of the order under section 127 of the Act transferring his assessment jurisdiction from territorial ward to the respondent, that is, Investigation Circle 1(1). By a communication dated 4th July, 2001, the respondent sent an abstract of the order passed by the Commissioner vesting jurisdiction with him. The petitioner thereafter moved the present petition challenging the impugned notice.

4. Mr. J.P. Shah, learned counsel for the petitioner submitted that the search had taken place on 21st April, 1995. During the course of search, the petitioner had made a statement that he would disclose income in the assessment year 1995-96. However, on the same day, he had made an affidavit retracting his disclosure. The assessment for the assessment year 1994-95 came to be completed on 27th March, 1997 and the return of income in relation to the year under consideration was filed on 26th March, 1997. While filing such return, there was no duty cast upon the assessee to incorporate in the return the fact that this was a search case. In support of such submission, the learned counsel placed reliance upon the decision of the Calcutta High Court in the case of **Commissioner of Income Tax v. Laxmidebi Mehta**, (1994) 121 CTR (Cal.) 171, wherein the court in the context of the failure on the part of the assessee to disclose fully and truly all material facts had observed that admittedly there was no column in the return showing the number of bonus shares. Once the sale of the shares was disclosed, it was for the ITO to check up the correctness of the assessee's claim.

4.1 Referring to the reasons recorded, it was pointed out that according to the respondent, the petitioner had filed the return of income before the Income Tax Officer, Ward 1(2), Rajkot despite the fact that he was aware that his jurisdiction lies with the Investigation Circle – 1(1). It was submitted that the petitioner was regularly assessed by the ITO, Ward 1(2) and at no point of time was he ever informed about the change in jurisdiction. If as a consequence of the search, there was a change in the jurisdiction, the Department ought to have informed him that he should have filed subsequent returns with the Investigation Circle and not with the regular ward. Referring to the return filed by the petitioner for the assessment year 1994-95, it was pointed out that the said return was forwarded by the Assessing Officer, Ward 1(2) to the Investigation Circle. Hence, the said Assessing Officer was well aware of the fact that this was a search case. Under the circumstances, in case of the returns filed by the petitioner for the subsequent years, the petitioner should either have been told to file the same with the Investigation Circle or the Assessing Officer ought to have forwarded the same to the Investigation Circle, if he did not have the jurisdiction to make assessment.

4.2 The learned counsel next submitted that the assessment year is 1995-96, whereas the impugned notice seeking to reopen the assessment has been issued on 25th May, 2001, which is clearly beyond a period of four years from the end of the relevant assessment year, under the circumstances, in the absence of any failure on the part of the petitioner to disclose fully and truly all material facts necessary for his assessment for that assessment year, the assumption of

jurisdiction by the Assessing Officer under section 147 of the Act is not valid. Referring to the order dated 21st April, 1995 made under section 132(5) of the Act, it was submitted that the year of taxability came to be determined in section 132(5) proceedings. It was pointed out that in the said order, income of Rs.26,61,700/-, which included the items in respect of which the assessment is sought to be reopened for the year under consideration, is shown to be the undisclosed income of the petitioner for assessment year 1996-97. Under the circumstances, when the undisclosed income was not taxable in 1995-96, no significance can be attached to the petitioner not making such disclosure in respect of assessment year 1995-96, more so, when the revenue authorities themselves say that it is taxable in assessment year 1996-97. In support of his submission, the learned counsel placed reliance on the decision of this High Court in the case of **Ahmedabad Cotton Mfg. Co. Ltd. v. Union of India and Another**, (1974) 95 ITR 639. Reliance was also placed upon the decision of the Supreme Court in the case of **Parashuram Pottery Works Co. Ltd. v. Income-Tax Officer, Circle I, Ward A, Rajkot**, (1977) 106 ITR 1, for the proposition that any remissness on the part of the Assessing Officer can only be at the cost of the national exchequer and must necessarily result in loss of revenue. However, so far as income-tax assessment orders are concerned, they cannot be reopened on the score of income escaping assessment under section 147 of the Act after the expiry of four years from the end of the assessment year unless there be omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. Adverting to the reasons recorded, it was pointed out that according to the respondent, the return of income filed

by the petitioner for assessment year 1995-96 as well as the order passed under section 143(3) of the Act are without jurisdiction and have no legal sanctity. Attention was invited to the affidavit-in-reply filed by the respondent to point out that in the affidavit-in-reply, the respondent has adopted a different stand and has stated that it is not the case of the Department that the order passed by the Income Tax Officer, Ward 1(2) is bad in law. The only point is that income has escaped assessment.

4.3 Reference was made to the contents of Civil Application No.4816/2004 filed by the respondent for vacating the interim relief granted in the present petition wherein it has been stated that out of the disclosure of Rs.25,12,753/-, the amount of Rs.2,00,000/- being marriage expenses of daughter and value of gold ornaments being bangles amounting to Rs.30,000/- have been taxed in the assessment year 1994-95. Further, the amount of Rs.1,43,000/- pertains to financial year 1992-93 relevant to assessment year 1993-94. The difference of cash of Rs.20,000/- has been taxed in the reopened assessment of 1996-97. It was submitted that in the aforesaid premises, out of the seven items in respect of which the assessment is sought to be reopened, in respect of four items, the assessee has already been taxed in other years. As regards the remaining three items, it was pointed out that during the course of the assessment proceedings for assessment year 1996-97, the respondent had issued notice dated 20th December, 2002 under section 142(1) of the Act calling upon the petitioner to provide information in respect of various items. Referring to the said notice, it was pointed out that items No.(d), (e) and (h) pertain to the remaining three items in

respect of assessment year 1995-96. From the assessment order framed under section 143(3) read with section 147 of the Act in relation to assessment year 1996-97, it was pointed out that the Assessing Officer after considering the reply filed by the petitioner pursuant to the notice dated 20th December 2002, had dropped the aforesaid items and had not taxed them. It was submitted that under the circumstances, when the said items have already been considered in relation to year 1996-97 and the Assessing Officer after considering the reply filed by the petitioner has dropped the said items, it is not now permissible for the respondent to assess the petitioner in relation to the said items for the year under consideration. In conclusion, it was urged that the reopening of assessment beyond a period of four years from the end of the relevant assessment year without there being any failure on the part of the petitioner to disclose fully and truly all material facts is without authority of law.

5. Vehemently opposing the petition, Mrs. Mauna Bhatt, learned senior standing counsel for the respondent submitted that at the time when the return for assessment year 1995-96 came to be filed by the petitioner, the proceedings in relation to the previous assessment year, that is, 1994-95 were already pending before the Investigation Circle and the petitioner was well aware of the change in jurisdiction. The petitioner, therefore, ought to have filed the subsequent returns with the Investigation Circle whereas, the petitioner deliberately kept on filing the returns of income with the Income Tax Officer, Ward 1(2).

5.1 Next, it was submitted that the disclosure of income

made by the assessee should be full and true and not a pretence. During the course of search proceedings which had taken place on 21st April, 1995, the petitioner had declared undisclosed income of Rs.25,15,753/- and had stated that tax payable on the income so disclosed by him would be paid at the time when the return of income became due for assessment year 1995-96. Thus, the petitioner had not only disclosed income of Rs.25,15,753/- but had also agreed to pay tax payable on such disclosure. It was pointed out that subsequently by a letter dated 8th May, 1995 the petitioner had retracted his disclosure made during the search. However, while filing the return of income for the year 1995-96, the petitioner had not disclosed that this was a search case, nor did he at any time during the course of assessment proceedings bring to the notice of the Assessing Officer that he had made a disclosure. All these were undoubtedly material for the petitioner's assessment and as such, evidently the petitioner has failed to disclose primary facts regarding the search. Under the circumstances, the petitioner having failed to disclose full and true facts during the course of assessment proceedings under section 143(3) of the Act, the reopening of assessment beyond a period of four years is fully justified and within the jurisdiction of the Assessing Officer.

5.2 It was also vehemently contended that the order made by the Assessing Officer, Ward No.1(2) was without jurisdiction in view of notification issued under section 120 of the Act, whereby jurisdiction in respect of search cases was vested in the Assistant Commissioner of Income-tax, Investigation Circle-1(1), Rajkot. Hence, the assessment order is itself a nullity. In support of such submission, the learned

counsel placed reliance upon the decision of the Supreme Court in the case of **Industrial Trust Ltd. vs. Commissioner of Income-Tax (Central and Rajasthan)**, (1973) 91 ITR 550, for the proposition that ordinarily an assessee has to be assessed by the Income-tax Officer within whose territorial jurisdiction he resides. But it is open to the Central Board of Revenue to assign any particular class of assessee or any particular type of assessments to an Income-tax Officer of its choice. In case where the return is submitted to an Income-tax Officer who has no jurisdiction over the assessee, the return itself is invalid. It was contended that the petitioner was well aware of his jurisdiction because he had filed the retraction with the Investigation Circle. He was appearing before the Investigation Circle in relation to the assessment year 1994-95 and had full knowledge about the fact of jurisdiction. The filing of return before an Assessing Officer, who had no jurisdiction, therefore, also amounts to non-filing of a return. In support of her submissions, the learned counsel placed reliance upon the decision of the Gauhati High court in the case of **Sanwarmal Agarwal v. Assistant Commissioner of Income-tax and Another**, 229 ITR Gauhati 783, as well as the decision of the Delhi High Court in the case of **B.R. Industries Ltd. v. Commissioner of Income-tax and others**, 255 ITR 593.

6. The undisputed facts of the case are that there was a search on the premises of the petitioner on 21st April, 1995. During the course of the search, the petitioner made disclosure of unaccounted income for assessment year 1995-96 and declared concealed income of Rs.25,15,753/-. On the same day, the petitioner made an affidavit retracting such disclosure, which does not appear to have been given to the Income Tax

authorities at the relevant time. However, by a letter dated 8th May, 1995, the petitioner retracted his disclosure made during the course of search. Subsequently, the petitioner filed his return of income for assessment year 1994-95 on 26th March, 1996 and the assessment came to be framed on 27th January, 1997. The return of income for the year under consideration, that is, assessment year 1995-96 came to be filed on 26th March, 1997. Both the returns came to be filed with the Income Tax Officer, Ward 1(2), Rajkot. In relation to assessment year 1994-95, the Assessing Officer, Ward 1(2) forwarded the return of income to ACIT Investigation (1), Rajkot. Accordingly, the proceedings in relation to assessment year 1994-95 were taken before the Investigation Circle and the assessment came to be framed on 27th March, 1997. The petitioner filed the return in relation to assessment year 1995-96 before the Assessing Officer, Ward 1(2). He, however, admittedly did not disclose the fact regarding the disclosure made during the course of the search as according to him, there was no duty cast upon him to incorporate in the return the fact that this was a search case.

7. It is an undisputed position that the assessment in the present case is sought to be reopened after the expiry of a period of four years from the end of the relevant assessment year. Under the circumstances, the proviso to section 147 of the Act would clearly be attracted and the Assessing Officer would be required to record satisfaction to the effect that there was failure on the part of the petitioner to disclose fully and truly all material facts necessary for his assessment for the assessment year under consideration. A perusal of the reasons recorded indicates that the same is in three parts. The first part refers to the search proceedings and the disclosure made by

the petitioner in his individual capacity which is in respect of seven items. The petitioner had also stated that the tax payable on the income so disclosed would be paid at the time when the return becomes due for the assessment year 1995-96. In the second part of the reasons, the Assessing Officer has recorded that the assessment for assessment year 1994-95 was completed by Investigation Circle on 27th March, 1997 and that the assessee was well aware that his jurisdiction lies with the Circle, despite which he chose to file the return for the year under consideration with the Income Tax Officer, Ward 1(2), Rajkot and got the assessment completed without any reference to the search proceedings. Thus, both, the return of income as well as the assessment order are without jurisdiction. The third part of the reasons indicates that according to the Assessing Officer, on verification of the return filed in the assessment year 1995-96, it is seen that the assessee has not shown the undisclosed income as per the statement recorded on oath on 21st April, 1995 and as such, the assessment framed under section 143(3) does not include the income disclosed during the course of search.

8. Dealing with the second part of the reasons recorded, viz., that the return filed by the petitioner as well as the assessment order passed under section 143(3) of the Act for assessment year 1995-96 are without jurisdiction, it may be pertinent to note that in his affidavit dated 31st August, 2001, the respondent has categorically averred that it is not the case of the Department that the order passed by ITO, Ward 1(2) is bad in law. The only point is that income has escaped assessment. Thus, the Assessing Officer appears to have given up the said contention recorded in the reasons. Insofar as the

say of the respondent that filing the return of income before the wrong Assessing Officer amounts to non-filing of return, this court in the petitioner's own case in Special Civil Application No.6557 of 2001 and other cognate matters, by a judgment and order dated 13th August, 2012 has in relation to assessment years 1997-98 to 2000-01 wherein the assessments were sought to be made under section 147 of the Act on the sole ground that the returns filed before the Income Tax Officer, Ward 1(2) were invalid returns, has held thus:-

“12. In the present case, undisputed facts are that the petitioner was ordinarily assessed by Income Tax Officer, Ward 1(2), Rajkot. It was before this officer that the assessee filed his returns for the assessment year 1996-97 and later years. Such returns were accepted under section 143(1) of the Act. It is also not in dispute that previously on 21.4.1995, the assessee's premises were subjected to search operations. Before us, the Department has produced a notification dated 30.4.1991 issued under section 120 of the Act by C.B.D.T. by virtue of which, the jurisdiction in case of all persons (other than those in respect of which the DC (IT), Special Range, Rajkot has jurisdiction) where search under section 132 of the Act has been carried out on or after 1.4.1985 and residing in or having principal place of business in municipal wards specified therein and the Rajkot district, the jurisdiction would lie with the Assistant Commissioner of Income Tax (Investigation), Circle-1, Rajkot. We may, however, note that earlier when the petitioner demanded from the Department on what basis the jurisdiction is transferred, the Department wrote on 4.7.2001. The Department relied upon an order dated 1.7.1998 issued by the Commissioner of Income Tax under which it was provided that in case of all persons where search actions have been carried out under section 132/132A of the Act on or after 1.4.1993 and who are residing in or having their principal place of business/profession or registered office in municipal wards of Rajkot Municipal Corporation or within the limits of Rajkot district, the jurisdiction would lie with the Assistant Commissioner of Income Tax (Investigation), Circle-1, Rajkot. Perhaps being pointed out that such order dated

1.7.1998 was passed after the returns were filed, in the affidavit filed before us, the Department produced the above noted notification. We note this only with a view to highlight that even the departmental authorities were not clear on what basis the jurisdiction in case of the petitioner stood transferred. Can we then expect the petitioner to be aware of such notifications and to file returns before an officer other than his normal Assessing Officer?

13. Even if we proceed on the basis that the petitioner filed the returns before his original Assessing Officer who was a wrong officer, can the Department now take a stand that such returns were non est and therefore, the assessments subjected to reopening on the premise that no returns were filed?

14. In the facts of the present case, we are unable to accept such a stand of the Department. On the basis of the returns filed by the petitioner, and the intimation sent by the Department under section 143(1) of the Act, the assessee discharged his tax liabilities. The Department without ever questioning filing of such returns before a wrong officer, having accepted the tax paid under such returns, now cannot be allowed to contend that such returns were filed before wrong officers who had no jurisdiction to accept the same.

15. It is not reflected from the record that the petitioner was ever made aware about the change of jurisdiction of the Assessing Officer. It may be that for the assessment year 1994-95, the return was processed under section 143(3) of the Act by the A.C.I.T. (Investigation), Rajkot. However, the fact that being subjected to search, all subsequent returns had to go before specified officer and not the ordinary Assessing Officer having jurisdiction over the petitioner's assessment, was nowhere conveyed to him. Section 120(1) of the Act does envisage that the income-tax authorities shall exercise powers and functions as assigned to them by the Board under the Act. The fact that the Board had jurisdiction to issue notification transferring jurisdiction in specified class of cases is not in dispute. However, when the assessee filed his returns before his ordinary Assessing Officer, primarily the Assessing Officer concerned could have either refused to accept such returns or could have transferred them before the competent authority. He not having done so, after a

long period of time, it would not be open for the Department to ignore such returns contending that the same were filed before the officer who had no jurisdiction and therefore, such returns were non est. Any such attempt on the part of the Department would lead to abnormal and incongruent situation. The returns accepted by the Assessing Officer, with or without scrutiny and the assessment framed thereon would stand in eye of law. The petitioner – assessee who paid taxes as per his own declaration or may be in a given case, on a further demand by the Assessing Officer on intimation or scrutiny, would now be subjected to a fresh assessment as if the original assessment was non est, while at the same time, the taxes paid by him would be retained by the Department.”

Thus, the contention that filing the return of income before the wrong Assessing Officer amounts to non-filing of return, therefore, stands concluded by the above decision. The said ground for reopening the assessment is, therefore, not a valid ground. Besides, as noticed earlier, on the basis of such return the concerned Assessing Officer has already framed assessment under section 143(3) of the Act in respect of which the respondent in the affidavit-in-reply has stated that the assessment order does not lack jurisdiction. Thus, for this reason also, the said ground is rendered unsustainable.

9. As regards the other grounds for reopening the assessment, it may be noted that the assessment is sought to be reopened in relation to seven items. Reference may be made in this regard to the memorandum of Civil Application No.4816/2004 filed by the respondent seeking vacation of the interim relief granted in the present petition wherein it has been categorically stated that insofar as items No.2 and 5 are concerned, the same have been taxed in assessment year 1994-95, item No.6 pertains to assessment year 1993-94, and

item No.4 has been taxed in assessment year 1996-97. It has also been categorically averred in the said application that three items now remain namely, items No.1, 3 and 7.

10. It may be recalled that the learned counsel for the petitioner has contended that in relation to assessment year 1996-97, notice dated 20th December, 2002 had been issued calling upon the petitioner to provide information in relation to various items which included the remaining three items also. It has been submitted that as the Assessing Officer after considering the explanation of the petitioner has not taxed the said items, it was no longer open for the Assessing Officer to once again consider the said items in relation to the year under consideration. To test the aforesaid contention, it may be pertinent to refer to the reply dated 16th January, 2003 filed by the petitioner in response to the notice dated 20th December, 2002 issued under section 142(2) of the Act wherein, in relation to the issue at paragraph (d) of the notice regarding excise duty penalty of Rs.68,753/-, it has been stated that the same had been paid by the company M/s. Jayshakti Chemicals Pvt. Ltd. in the month of February, 1995. In relation to the issue raised vide paragraph (e) which pertains to the construction of four shops in the building known as "Panchshil", it has been stated that the said shops had been constructed by the petitioner's sisters during the period from 18th December, 1994 to 3rd March, 1995 for Rs.54,000/-. As regards the issue raised in paragraph (g), relating to Rs.20,00,000/- which was received by Shri Kishorbhai Andipara, it has been stated that the said amount has been paid to the company between the accounting year 1992-93 to the accounting year 1994-95. A perusal of the assessment order in respect of assessment year 1996-97,

shows that the Assessing Officer has not discussed the aforesaid three items.

11. As is apparent from the reply dated 16th January, 2003 filed by the petitioner in response to the notice dated 20th December, 2002, as per the information furnished by the petitioner the said items related to accounting year 1994-95 relevant to assessment year 1995-96. This say of the petitioner appears to have been accepted by the petitioner and the said amounts have, therefore, not been taxed in assessment year 1996-97. Under the circumstances, the mere fact that the Assessing Officer has not expressly stated in the assessment order that the said items pertain to assessment year 1995-96 and are, therefore, not taxed in the year under consideration does not detract from the fact that it was the case of the petitioner himself that the said items did not pertain to assessment year 1996-97 but to assessment year 1995-96.

12. The next and the central issue that arises for consideration is as to whether there was any failure on the part of the petitioner to disclose fully and truly all material facts for his assessment. From the facts noted hereinabove, it is apparent that the petitioner had during the course of the search proceedings made a statement on oath declaring undisclosed income of Rs.25,15,753/- in relation to assessment year 1995-96 and had also stated that the said income would be disclosed and paid at the time when the return of the income becomes due for assessment year 1995-96. It is true that by a letter dated 8th May, 1995, the petitioner had subsequently retracted the statement made during the course of search. However, while filing the return of income for

assessment year 1995-96, the petitioner had not disclosed to the Assessing Officer that he had made such disclosure which he had subsequently retracted as according to him, there is no duty cast upon him to make such disclosure while filing his return of income. In the opinion of this court, the fact regarding the search having taken place and the petitioner having made a disclosure was relevant material and was a primary fact which ought to have been disclosed during the course of assessment proceedings. It is true that the petitioner had subsequently retracted the said statement. However, the petitioner in his statement recorded during the course of search having stated that the said income would be disclosed while filing the return for assessment year 1995-96 ought to have brought such fact to the notice of the Assessing Officer. The contention that there was no obligation cast upon the petitioner to make such disclosure while filing the return of income, does not merit acceptance. The Supreme Court in **Calcutta Discount Co. Ltd. v. Income-tax Officer**, (1961) 41 ITR 191, while examining the scope of disclosure which section 147 of the Act demands, has held thus:

“xxxxx. The words used are “omission or failure to disclose fully and truly all material facts necessary for his assessment for that year”. It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material, and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise — the assessing authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the fur-

ther facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable. Thus, when a question arises whether certain income received by an assessee is capital receipt, or revenue receipt, the assessing authority has to find out what primary facts have been proved, what other facts can be inferred from them, and taking all these together, to decide what the legal inference should be.

9. *There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income Tax Officer might have discovered, the legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example — “I have produced the account books and the documents: You, the assessing officer examine them, and find out the facts necessary for your purpose: My duty is done with disclosing these account-books and the documents.” His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents, which are relevant, amount to “omission to disclose fully and truly all material facts necessary for his assessment.” Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them — including particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed.”*

13. In **Malegaon Electricity Co. (P) Ltd. v. CIT**, (1970) 2 SCC 431, the Supreme Court held thus:

8. In our judgment the tribunal erred in declining to decide the question whether any portion of the sale price came within the scope of Section 10(2)(vii). That question should have been examined at the very outset for the purpose of considering whether the assessee had placed before the Income Tax Officer truly and fully all material facts necessary for the purpose of its assessment. If it is found that any portion of that sale price are profits then in our opinion the High Court was right in holding that the assessee had failed to place before the Income Tax Officer during the original assessment truly and fully all material facts necessary for the purpose of assessment. Admittedly the price realised at the sale in excess of the written down value of the assets sold, had not been included as profits in the return submitted by the assessee. It had also not shown the same in Section 'D' of Part I of the return. It may also be noted that the assessee had not shown either in its return or in any of the documents submitted to the Income Tax Officer, the written down value of the assets sold. Hence not only the Income Tax Officer was not told that the assessee had earned any profits under Section 10(2)(vii) nor even the essential fact viz. the written down value of the assets sold was supplied to him so as to enable him to find out the price in excess of the written down value realised by the assessee. It is true that if the Income Tax Officer had made some investigation particularly if he had looked into the previous assessment records, he would have been able to find out what the written down value of the assets sold was and consequently he would have been able to find out the price in excess of their written down value realised by the assessee. It can be said that the Income Tax Officer if he had been diligent could have got all the necessary information from his records. But that is not the same thing as saying that the assessee had placed before the Income Tax Officer truly and fully all material facts necessary for the purpose of assessment. The law casts a duty on the assessee to "disclose fully and truly all material facts necessary for his assessment for that year". Further, Explanation to Section 34(1) says:

"Production before the Income Tax Officer of account-books or other evidence from which material facts could with due diligence have been discovered by the Income Tax Officer will not necessarily amount to disclosure within the meaning of 'this Section.'"

9. If the assessee had disclosed to the Income Tax Officer, the surplus price realised by it over and above the written down value of the assets sold in the alternative if it had informed the Income Tax Officer the price realised as well as the written down value of the assets sold, then it could have been said that the assessee had done its duty and it was for the Income Tax Officer to draw any inference on the facts placed before him. But the failure of the assessee to disclose to the Income Tax Officer the fact that the price realised by it by sale of its assets was more than the written down value of those assets or at least the written down value of those assets amounts, in our opinion, to a failure on its part to disclose fully and truly the material facts necessary for its assessment. From the cryptic statement of the Income Tax Officer in the original assessment order that "no adjustment is necessary" the tribunal was not justified in drawing the inference that the Income Tax Officer had considered all the relevant facts.

14. In the facts of the present case also, it may be that if the Assessing Officer had made some efforts and examined the record of the previous assessment year, he may have come to know that this was a search and could have taken consequent action thereon. However, that by itself would not absolve the petitioner from the duty to disclose all primary facts before the Assessing Officer. Merely because the format in which the return is required to be filed does not provide for any column wherein the assessee is required to state that this is a search case and that he had made certain disclosures during the course of search, does not mean that an assessee is not required to disclose other facts that are material for his assessment. At the cost of repetition it may be stated that the fact regarding the petitioner having made a disclosure, though subsequently retracted, was material for the assessment of the petitioner for the assessment year under consideration. Thus,

by not disclosing such material fact, evidently, the petitioner has failed to disclose fully and truly all material facts necessary for his assessment. The Assessing Officer was, therefore, entitled to hold a belief as regards escapement of income chargeable to tax on the ground that there was failure on the part of the petitioner to disclose fully and truly all material facts necessary for the assessment. Under the circumstances, it cannot be said that the assumption of jurisdiction by the Assessing Officer under section 147 of the Act is invalid. However, considering the fact that it is an admitted position that out of the seven items in respect of which the assessment is sought to be reopened, insofar as four items are concerned, the income has already been taxed in other assessment years, the reopening insofar as the items stated in the reasons recorded are concerned, would, therefore, be limited to the remaining three items.

15. Subject to the aforesaid, the petition fails and is accordingly dismissed. The interim relief granted earlier shall stand vacated. Rule is discharged with no order as to costs.

(Akil Kureshi, J.)

(Harsha Devani, J.)

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